CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 419

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARY M. HUTCHINGS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1940
CERTIORARI GRANTED OCTOBER 28, 1940

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1938

Sept. 5—Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.

Sept. 12—Proof of service filed by taxpayer.

Sept. 23—Praecipe for record filed by taxpayer. 10/2/39 1 copy received.

Sept. 26—Proof of service of praecipe filed. 10/2/39 1 copy received.

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2 PETITION.

Filed Sept. 7, 1938.

(Title Omitted.)

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency MT-ET-GT-230-35-1st Texas, dated June 10, 1938, and as basis of her proceedings alleges as follows:

1. The petitioner is an individual and resides at 2805 Avenue O, Galveston, Texas.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on or about June 10, 1938.

3. The taxes in controversy are gift taxes for the year 1935 and in the amount of $2,981.05.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner refused to allow but one $5,000.00 exclusion for a gift in trust to her seven children whereas he should have allowed seven exclusions of $5,000.00 each, or $35,000.00.

3 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On or about December 30, 1935 the petitioner was the owner in an undivided interest of a large number of tracts of land which she inherited from her father W. L. Moody, Sr. and from her mother, Mrs. Phœbe Elizabeth Moody. The petitioner's sever children were also owners of certain undivided interests in the same tracts of land, they also having inherited said lands. The lands were not susceptible of partition and division. On or about December 30, 1935 petitioner conveyed all of her undivided interest in and to said lands to two of her children, viz: Robert K. Hutchings and John Hutchings, as trustees for the benefit of her said seven children, all to share and share alike in said trust. Petitioner alleges there were seven donees instead of one and that seven exclusions should have been allowed.

Wherefore, the petitioner prays that this Board hear the proceeding and allow to the petitioner the seven exclusions of $5,000.00 each, or $35,000.00.

(s) MRS. MARY M. HUTCHINGS,
Petitioner.

2805 Avenue O,
Galveston, Texas.

The State of Texas,
County of Galveston

Mrs. Mary M. Hutchings, being duly sworn says that she is the petitioner above named; that she has read the foregoing petition, or has had the same read to her, and is fa-

miliar with the statements contained therein, and that the statements contained therein are true.

(s) MRS. MARY M. HUTCHINGS.

Subscribed and sworn to before me this the 6th day of September, A. D. 1938.

(s) T. W. LAIN,
Notary Public in and for Galveston County, Texas.

4

Treasury Department
Washington

June 10, 1938.

Office of
Commissioner of Internal Revenue

Address reply to
Commissioner of Internal Revenue
and refer to
MT-ET-GT-230-35-1st Texas

Donor—Mary M. Hutchings.

Mrs. Mary M. Hutchings,
2805 Avenue O,
Galveston, Texas.

Madam:

A deficiency of $2,981.05 in your Federal gift tax liability for the calendar year 1935 has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the copies of the letters attached.

This notice of deficiency is given in accordance with the provisions of Section 513 (a) of the Revenue Act of 1932

as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Appeals within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890A, waiving the restrictions on the immediate assesment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit you by preventing the accumulation of interest charges, as the interest period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890A, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,
GUY T. HELVERING,
Commissioner,
By D. S. BLISS,
Deputy Comm'r.

Enclosures:
Waiver, Form 890A.
Copies of Letters.

5 An examination of the return discloses the following:

	Returned	Tentatively Determined
Total gifts, 1935	$118,065.00	$144,970.34
Less exclusions	35,000.00	5,000.00
Amount included	83,065.00	$139,970.34
Less specific exemption	50,000.00	50,000.00
Net Gifts	$ 33,065.00	$ 89,970.34
Tax on net gifts	564.94*	3,523.00
Tax assessed on return		541.95
Deficiency		$ 2,981.05

*Should be $541.95.

The deficiency bears interest at the rate of six per cent per annum from the due date of the tax, March 15, 1936, to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The deficiency results from the following adjustments:

Schedule A.

1,000 shares Moody Cotton Company	1.00	10,000.00
Interest in real estate	118,064.00	119,745.34
Interest in mineral rights	0.00	15,225.00

	Tentatively Determined	Returned
Exclusions	5,000.00	35,000.00
To balance (amount of increase)	56,905.34	

Inasmuch as the trust to which the gifts were made is considered to be one donee, only one exclusion therefor may be allowed.

The payment of $22.99, which is being held by the Collector in his suspense account, will be taken into consideration by him in the final adjustment of the amount of tax and interest due.

Respectfully,
(s) D. S. BLISS,
Deputy Commissioner.

Enclosure:
Waiver.

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6 ANSWER.

Filed Oct. 4, 1938.

(Title Omitted.)

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4 (a). Denies that respondent's determination is based on errors as alleged in subparagraph (a) of paragraph 4 of the petition.

5 (a). Denies the material allegations of fact set forth in subparagraph (a) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissoiner's determination of deficiency be approved.

(s) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
JAMES H. YEATMAN,
Special Attorney,
Bureau of Internal Revenue.

7 United States Board of Tax Appeals.

Mary M. Hutchings, Petitioner
vs.
Commissioner of Internal Revenue, Respondent.

Docket No. 95359. Promulgated June 6, 1939.

Petitioner, as doner, created an irrevocable trust for a term of years, to which she transferred her entire interest in certain described properties for the use and benefit of her seven children. *Held*, petitioner is entitled to one exclusion of $5,000 in determining the amount of her gift subject to the gift tax.

I. M. Tullar, Esq., for the respondent.

This proceeding involves a deficiency in gift tax for 1935 in the amount of $2,981.05. In determining the deficiency the respondent allowed one exclusion of $5,000 upon the theory that petitioner's transfer to the trust was a

transfer to one donee. The petitioner contends that since there were seven beneficiaries she is entitled to a total exclusion of $35,000. The parties submitted the proceeding upon an agreed stipulation of facts, so that the only question remaining is whether, as a matter of facts, so that the only question remaining is whether, as a matter of law, petitioner is entitled to one exclusion of $5,000 or seven exclusions of $5,000.

FINDINGS OF FACT.

The petitioner resides in Galveston, Texas. On December 30, 1935, she executed an indenture of trust in which she was joined *pro forma* by her husband. The instrument recites that the grantor desired to "convey, assign, transfer and deliver to the Trustees certain real estate, personal property and securities hereinafter described for the purpose of creating a *voluntary living trust.*" (Emphasis supplied.) The property conveyed was "all of the Grantor's right, title, interest and estate" in the described personal and real properties, and was valued by respondent at $144,970.34, which value is not disputed by the petitioner.

The trustees were to hold the property in trust for the use and benefit of the grantor's seven children and in their sole and absolute discretion could hold and accumulate the entire net income, interest, rents, profits, and revenues of the trust corpus, or distribute the same according to the respective interests of the beneficiaries, who were to share and share alike in all distributions and payments of either principal or income. In the event of the death of a beneficiary prior to the termination of the trust, his or her interest was to go to the person or persons designated in the will of the deceased beneficiary, and in default of appointment "his or her interest in the trust estate" vested in the deceased beneficiary's heirs at

law as determined by the law of descent and distribution of Texas.

Paragraph six of the trust agreement provides:

> Neither the principal nor the income of the trust shall ever be liable for the debts of any beneficiary hereunder, nor shall the same be subject to seizure by any creditor of any such beneficiary under any writ or proceedng at law or in equity, and no such beneficiary shall have power to sell, assign, transfer, convey, encumber, or in any other manner dispose of or anticipate the disposition of his or her interest in the trust property, or the income to be produced thereby, or any divisions or distributions thereof.

The trust was to terminate March 1, 1957, unless sooner terminated by final division and distribution of the trust property. Upon termination of the trust any and all property was to be paid over and delivered to the then beneficiaries according to their respective interests. In paragraph numbered twelve the trust indenture provides as follows:

> The Grantor shall have no power to revoke *the trust created hereby,* in whole or in part, nor shall she have the power to revest in herself any part of the principal of the trust, nor any part of the income thereof, or therefrom. [Emphasis supplied.]

In arriving at the deficiency asserted in this cause the respondent allowed a specific exemption of $50,000 and one exclusion of $5,000.

OPINION.

ARNOLD:

Section 501 (a) of the Revenue Act of 1932 imposes a tax upon the *transfer* by any individual, resident or nonresident, of property by gift. Section 501 (b) of that act provides that the tax shall apply whether the *transfer* is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Section 504 (b) of the same act provides that the first $5,000 of gifts made "to any person" shall not be included in the total amount of gifts made during the taxable year. Section 1111 of the 1932 Act, in defining the term "person," provides that it shall mean *inter alia* "a trust."

In *Seymour H. Knox*, 36 B. T. A. 630, we considered the question here presented and held that for the purpose of the $5,000 exclusion the trust, as an entity, was the "person" within the meaning of Section 504 (b). In so deciding we cited and relied upon *Commissioner* vs. *Wells* (C. C. A., 7th Cir.), 88 Fed. (2d) 339, affirming 34 B. T. A. 315; *Commissioner* vs. *Krebs* (C. C. A., 3d Cir.), 90 Fed. (2d) 880, affirming a memorandum opinion of this Board; and *Noyes* vs. *Hassett*, 20 Fed. Supp. 31. Subsequent decisions of this Board have followed the principle announced in the *Knox* case, *supra*, and in a recent decision of the Circuit Court of Appeals for the Eighth Circuit, *Robertson* vs. *Nee*, — Fed. (2d) — (Mar. 6, 1939), it was held that a transfer in trust in 1935 to one trustee was entitled to only one $5,000 exclusion since only one trust was created. The Court so decided despite the specific provisions of the trust indenture providing for the division of the trust estate into three parts and naming the wife and the two children of the grantor as beneficiaries, each being entitled to the income and principal of one of the parts of the trust estate.

In *Welch* vs. *Davidson*, 102 Fed. (2) 100, the Circuit Court of Appeals for the First Circuit reached the opposite con-

clusion, and was followed by the United States District Court for the Northern District of Illinois in *Ryerson* vs. *United States*, — Fed. Supp. — (Mar. 31, 1939). Despite our respect for the opinion of the Circuit Court of Appeals for the First Circuit and the opinion of the Federal District Court which followed the First Circuit, we feel obliged to follow the rule laid down in *Seymour H. Knox, supra*, and in *Robertson* vs. *Nee, supra*.

The facts in the instant proceeding are on all fours with the facts in the *Robertson* case. The trust here created was clearly intended to be a single trust with seven beneficiaries who were to share equally in the trust income and principal. Every reference in the trust indenture points to an intent and purpose to create a single trust estate for the distribution of income and corpus among the several beneficiaries. We hold, therefore, that the property was transferred to the trust as an entity, and that petitioner is entitled to but one exclusion of $5,000 as determined by the respondent.

Decision will be entered for the respondent.

10 DECISION.

United States Board of Tax Appeals
Washington

Mary M. Hutchings, Petitioner,
vs. Docket No. 95359
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Board, as set forth in its report promulgated June 6, 1939, it is

Ordered and Decided: That there is a deficiency in gift tax in the amount of $2,981.05 for the year 1935.

Enter:

(s) C. R. ARUNDELL,
Member.

Entered June 6, 1939.

PETITION FOR REVIEW IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND ASSIGNMENTS OF ERROR.

Received Sep. 5, 1939.

Filed Sep. 5, 1939.

(Title Omitted.)

Now comes Mary M. Hutchings, hereinafter called "petitioner," and would respectfully show:

1.

That she is an individual, a citizen of the United States, and an inhabitant of the State of Texas which is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit; that more particularly, her residence is 2805 Avenue O, Galveston, Texas; that respondent, Guy T. Helvering, is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States.

2.

That the nature of the controversy is as follows:

On December 30, 1935, petitioner, Mary M. Hutchings, executed an indenture of trust, conveying certain property to Trustees named therein for the use and benefit of her seven (7) children who were to share equally in all distributions of payments of either principal or income. In her gift tax return for the calendar year 1935, petitioner claimed an exclusion of $35,000.00 upon the theory that the transfer constituted seven different gifts to each of her seven children, and she was entitled to

a $5,000.00 exclusion for each of them, or a total exclusion of $35,000.00. Respondent, however, allowed only one exclusion of $5,000.00 upon the theory that the transfer was to one donee and on June 10, 1938, determined a deficiency of petitioner's gift tax liability for the year 1935 in the amount of $2,981.05. Petitioner petitioned the United States Board of Tax Appeals for a redetermination of the deficiency, and by decision entered June 6, 1939, in cause styled *Mary M. Hutchings, petiitoner, vs. Commissioner of Internal Revenue, respondent,* Docket No. 95359, the Board of Tax Appeals, pursuant to its determination as set forth in its report promulgated June 6, 1939, being of the opinion that petitioner was entitled to but one exclusion of $5,000.00 rather than to seven or a total of $35,000.00 as contended by petitioner, ordered and decided that there was a deficiency in petitioner's gift tax liability in the amount of $2,981.05 for the year 1935.

13 3.

That petitioner being aggrieved by the conclusions of law made by the Board of Tax Appeals in its said report and also by said order fixing the deficiency, desires to obtain a review of said report and order by the United States Circuit Court of Appeals for the Fifth Circuit, and as reasons for such review, she alleges that the Board in rendering its opinion and entering said order fixing the deficiency, committed the following errors:

(1) The Board erred in not holding that each of the seven beneficiaries named in the trust indenture was "any person" within the meaning of Sec. 504b of the Revenue Act of 1932.

(2) The Board erred in holding that the trust, as an entity, was the "person" within the meaning of Sec. 504b of the Revenue Act of 1932.

(3) The Board erred in holding that the transfer by petitioner to the Trustees constituted a single gift to the trust, as an entity, entitling petitioner to only one exclusion of $5,000.00.

(4) The Board erred in failing to hold that the transfer by petitioner to the Trustees constituted seven gifts, one to each of the beneficiaries named in the trust instrument, entitling petitioner to an exclusion of $35,000.00.

(5) The Board erred in holding that the trust, as en entity, rather than the beneficiaries, was the donee for the purposes of determining the number of exclusions of $5,000.00 allowable under Sec. 504b of the Revenue
14 Act of 1932.

(6) The Board erred in failing to hold that the seven beneficiaries of the trust indenture, rather than the trust as an entity, were the donees for the purpose of determining the number of exclusions of $5,000.00 allowable under Sec. 504b of the Revenue Act of 1932.

(7) The Board erred in holding that petitioner was entitled to only one exclusion of $5,000.00.

(8) The Board erred in failing to hold that petitioner was entitled to seven exclusions of $5,000.00 each or a total of $35,000.00.

(9) The Board erred in holding that the property was transferred to the trust as an entity.

(10) The Board erred in failing to hold that each beneficiary named in the trust indenture was a donee within the meaning of Sec. 504b of the Revenue Act of 1932, as amended.

Wherefore, petitioner petitions that the said report and decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that transcript of the record be prepared in accordance with law and with the rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

15

Respectfully submitted,
(Signed) BALLINGER MILLS,
Attorney for Petitioner.

The State of Texas,
County of Galveston.

Mary M. Hutchings, being duly sworn, says that she is the petitioner above named; that she has read the foregoing and is familiar with the statements therein contained; and that same are true and correct.

(Signed) MARY M. HUTCHINGS,
Petitioner.

Sworn to and subscribed before me this the 31st day of August, 1939.

(Signed) C. P. WERNER,
Notary Public within and for the County of Galveston, State of Texas.

(Seal)

NOTICE OF FILING PETITION FOR REVIEW.

16

Filed Sep. 12, 1939.

(Title Omitted.)

To the Commissioner of Internal Revenue, Treasury Department, Washington, D. C.:

You are hereby notified that petitioner, Mary M. Hutchings, has filed with the Clerk of the Board of Tax Appeals

at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision and order of the Board heretofore rendered in the above entitled cause. A copy of the petition for review and the assignments of error, as filed, is hereto attached and served upon you.

Dated at Galveston, Texas, this the 31st day of August, 1939.

BALLINGER MILLS,
Attorney for Petitioner, Mary M. Hutchings.

Receipt and service of the above notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this the 6th day of September, 1939.

J. P. WENCHEL,
Attorney for Respondent on Review.

PRAECIPE FOR RECORD.

17 Filed Sep. 23, 1939.

(Title Omitted.)

To B. D. Gamble, Clerk of the United States Board of Tax Appeals, Washington, D. C.:

You are requested to prepare, certify, transmit, and deliver to Mr. Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans within sixty (60) days from September 5, 1939, the date of filing of petition for review, and in accordance with the rules of said Court, for filing, a transcript of the record

in the above styled cause and to include in said transcript of record, copies, duly certified as correct, of the following matters and documents, to-wit:

1. The docket entries of all proceedings before the Board;

2. All pleadings before the Board, including:

(a) Petition for redetermination;

(b) Answer;

3. Findings of fact, opinion, order, and decision of the Board;

4. Petition for review;

18 5. Notice of respondent of filing of petition for review and acknowledgment by respondent of service of notice of filing petition for review, and of a copy of the petition and of assignments of error;

6. This praecipe with acknowledgment of respondent of service thereof.

You are further requested to acknowledge receipt hereof; to advise us of the filing by respondent of acknowledgment of service hereof; and to advise us in ample time to secure order for enlargement if for any reason you are unable to comply with this request.

Dated at Galveston, Texas, this the 16th day of September, 1939.

BALLINGER MILLS,
Attorney for Petitioner, Mary M. Hutchings.
801 Union Station Buliding,
Galveston, Texas.

NOTICE OF FILING OF PRAECIPE FOR RECORD.

19 Received Oct. 2, 1939.

Filed Sep. 26, 1939.

(Title Omitted.)

To J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that petitioner, Mary M. Hutchings, has filed with the Clerk of the Board of Tax Appeals at Washington, D. C., a praecipe for record, requesting the Clerk to prepare, certify, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans for filing a transcript of the record in the above styled cause. A copy of the praecipe for record, as filed, is hereto attached and served upon you.

Dated at Galveston, Texas, this the 16th day of September, 1939.

BALLINGER MILLS,
Attorney for Petitioner, Mary M. Hutchings,
801 Union Station Building,
Galveston, Texas.

Receipt and service of the above notice together with a copy of the praecipe for record mentioned therein is hereby acknowledged this the 26th day of September, 1939.

(s) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

20 CERTIFICATE.

(Title Omitted.)

I, B. D. GAMBLE, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 19, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 10th day of October, 1939.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(Seal)

That thereafter the following proceedings were had in said cause
n the United States Circuit Court of Appeals for the Fifth Circuit,
iz:

Argument and submission

Extract from the Minutes of March 13, 1940

No. 9319

MARY M. HUTCHINGS

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by Rupert R. Harkrider, Esq., and Thomas W. Lain, Esq., for petitioner, and Miss Louise Foster, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

n the United States Circuit Court of Appeals for the Fifth Circuit

No. 9319

MARY M. HUTCHINGS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals (District of Texas)

April 13, 1940

Before SIBLEY, HUTCHESON, and HOLMES, Circuit Judges

HUTCHESON, Circuit Judge: Petitioner, having a donative intent toward her seven children, transferred to two of them in trust for the seven, property valued at $144,970.34. The Commissioner allowed a specific exemption of $50,000, and on the theory that the donation was one, to the trustees and not seven, one to each of the beneficiaries, allowed the donor one $5,000 exemption instead of the seven she claimed. The Board sustained the Commissioner's determination. Petitioner's appeal presents the single question whether, for the purpose of the $5,000 gift tax exclusion, allowed under Section 504B, Revenue Act of 1932, the gifts in trust should be treated as seven gifts; that is to each of the beneficiaries his proportionate part of the whole fund, or one gift, the whole of the fund to the trustees.

Petitioner is in the extremely fortunate position of being able to point out that every Circuit Court of Appeals and every District Court which has passed on the question,[1] has held that the objects of the donative intent in such cases and therefore the recipients of the gifts, are the beneficiaries, not the trustees, who are the mere instruments for carrying out the intent, and that the Board itself has in later cases, taken this same view.[2] She invites us to join the procession and to make it, except for respondent, unanimous. Respondent, standing his ground though deserted and alone, insists that all of the cited rulings and decisions are wrong, and appealing to our pride of opinion, invokes our independent judgment. We have examined and considered the question, both independently and in the light of the reasons advanced for and against respondent's determination and the Board's approval of it. We think it plain that wrongly based on the supposed but not the real purport and effect of Commissioner v. Wells, 88 Fed. (2d) 339; Commissioner v. Krebs, 90 Fed. (2d) 880, the conclusion of the Commissioner and the Board finds support neither in the language of the statute nor in the decisions the Board relies on.

Whatever of confusion and of apprehension as to its opening a loophole for gift-tax evasions, has arisen from a misconstruction of the effect of the holding in the Wells case, has been dissipated by the decisions cited in Note 1 and by Section 505 of the Revenue Act of 1938, which as to transfers in trust, takes away the exclusion entirely.

While not directly in point, these cases correctly construed, in effect support the view of petitioner that the gift is not to the trustees, but a present one to the beneficiaries, whether accomplished by the creation of one or more trusts. The case for petitioner's view is well and strongly put in Welch v. Davidson and in Rheinstrom v. Commissioner, supra. We can add nothing. The decision of the Board is reversed and the cause is remanded for a determination of the deficiency in accordance herewith.

Reversed and remanded.

SIBLEY, Circuit Judge, Concurring: I do not think the question is so onesided as it is made to appear. The Revenue Act of 1932, Sec. 554 (b), excluded from tax the first $5,000 "in the case of gifts (other than future interests in property) made to any person by the donor during the calendar year.". By Section 1111 (a) "The term 'person' means an individual, a trust or estate, a partnership, or a corporation." This definition was cited and applied in Commissioner vs. Wells, 88 Fed. (2d) 339, and Commissioner vs. Krebs, 90 Fed. (2d) 880, the trusts therein being treated as the donees of the gifts. However, most of the discussion was about the question of "future interests in property," and the holding on that was that what the donor presently parted with

[1] Davidson v. Welch, 22 Fed. Supp. 726; McBrier v. Commr., 108 Fed. (2d) 967; Rheinstrom v. Commr., 105 Fed. (2d) 642; Robertson v. Nee, 105 Fed. (2d) 651; Ryerson v. U. S., 28 Fed. Supp. 265; Welch v. Davidson, 102 Fed. (2d) 100.

[2] Rubinstein v. Commr., 41 B. T. A. —, No. 34. (B. T. A.); Winterbotham v. Commr., — B. T. A. —, decided Feb. 7, 1940.

and not what some beneficiary might presently receive was determinative. Welch vs. Davidson, 102 Fed. (2d) 100, rejected the idea that the trust was the donee, and by confusing the trust with the trustee (who of course takes title only and no beneficial interest), asserted that the beneficiaries are always the donees. Reliance was put on Burnett vs. Guggenheim, 288 U. S. 280, which decided nothing about whether the trust or the beneficiary was the "person" to whom a gift in trust is given, but decided only that the gift is not complete until the power to revoke it is extinguished. Rheinstrom vs. Commissioner, 105 Fed. (2d) 642; Robertson vs. Nee, 105 Fed. (2) 651; McBrier vs. Commissioner, 108 Fed. (2d) 967, follow the Welch case. The dictum of these latter cases that "in equity the beneficiary of a trust is the owner of the trust res" is not always true, as in the case of charitable trusts. Equity does not hold the trustee to be the full owner, because his title is incumbered with the trust, but often and for long periods the beneficiaries may be unknown or unascertainable, or some enterprise or cause is to be benefited rather than certain individuals. And if Congress really intended "the trust" to be regarded as the "person" who receives a gift, the attitude of equity would be immaterial. The amendment of Sect. 504 (b) by the Act of May 28, 1938, 52 Stat. 553, which excludes "gifts in trust" as well as "of future interests in property" from the $5,000 exemption, shows only that Congress thought best to avoid rather than settle the question whether the trusts or the individual beneficiaries should be counted in ascertaining the number of gifts.

While from an administrative standpoint it is regrettable to introduce a question of the donor's intention as controlling, I think we must. If it appears that some enterprise or charity or impersonal purpose, or even remote and unascertained first beneficiaries, furnished the motive for the gift in trust, it should be esteemed a single gift to the trust. If on the other hand the first beneficaries are ascertained individuals whom the donor wished to help, and used the trust only as a device to convey or preserve the gift or control its ultimate devolution, the gift is to these persons, and not to the trust, and there are as many gifts as there are first beneficiaries. In the case first put the gift is moved by a general benevolent purpose, and resembles a gift to a corporation, which would be but a single gift no matter who might be or become stockholders. In the second case the gift is moved by personal affection, intended to benefit special individuals who might have been made separate donees.

In the case before us the gift in trust was plainly not moved by any general idea or ideal, but by personal affection to her seven children. She might easily have created a trust for each in a seventh of the property. Her intention was to give each an equal share, with the safeguards afforded by the trust management. Without doubt her intention was to make a gift to each of her children, the trust being only the machinery to accomplish it.

(40 B. T. A. 27.)

Judgment

Extract from the Minutes of April 13th, 1940

No. 9319

MARY M. HUTCHINGS

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Mary M. Hutchings for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decision of the said United States Board of Tax Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said United States Board of Tax Appeals for a determination of the deficiency in accordance with the opinion of this Court.

"Sibley, Circuit Judge, Concurring."

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit:

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 21 to 27, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9319, wherein Mary M. Hutchings is petitioner, and Commissioner of Internal Revenue is respondent, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record, numbered from 1 to 20, are identical with the printed record upon which said cause was heard and decided in the said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 19th day of August, A. D. 1940.

[SEAL]

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit,
By (Sgd.) E. WENDLING,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1940

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARY M. HUTCHINS

MOTION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States:

Your petitioner, the Commissioner of Internal Revenue, respectfully presents this application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled cause, and in support thereof, presents the following:

STATEMENT

This proceeding was instituted in the Board of Tax Appeals to review a deficiency determined by the Commissioner of Internal Revenue. The respondent, during 1935, transferred property valued at $144,970.34 in trust for her seven children. The Commissioner, on the theory that the gift was to the trustees and not to the beneficiaries, allowed only one exemption of $5,000 instead of the seven exemptions of $5,000 each claimed by respondent. The Board sustained the Commissioner's determination. The Circuit Court of Appeals for the Fifth Circuit has reversed the Board's decision and held that the number of exemptions is determined by the number of beneficiaries to the trust.

REASON FOR EXTENSION OF TIME

A similar question on a comparable state of facts was presented to the Circuit Court of Appeals for the Seventh Circuit on May 16, 1940, in *United States* v. *Ryerson*, No. 7133, in which a decision has not yet been rendered.

It is petitioner's judgment that he should not burden this Court with a petition for a writ of certiorari unless there is a conflict of decisions between the Circuit Courts of Appeals. It is probable that a decision will be rendered in the *Ryerson* case within the next sixty days. Therefore, it is respectfully requested that an extension of sixty days from July 13, 1940, be granted for filing a petition for a writ of certiorari in the above-entitled case.

FRANCIS BIDDLE,
Solicitor General.

JULY —, 1940.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

MARY M. HUTCHINS

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR A WRIT OF CERTIORARI

On consideration of the motion of counsel for the petitioner in the above-entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be and the same is hereby extended for a period of sixty days from July 13, 1940.

Dated this 9th day of July 1940.

(Sgd.) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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Supreme Court of the United States

Order allowing certiorari

Filed October 28, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is assigned for hearing immediately following No. 393.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.